Supreme Court, U.S.
FILED

93 1129 DEC 20 1993

OFFICE OF THE CLERK

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

COTTER & COMPANY,

Petitioner,

v.

ROBERT E. BRIZENDINE,

Respondent.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. MOYNIHAN
COTTER & COMPANY
2740 N. Clybourn
Chicago, Illinois 60614
(312) 975-2916

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PEZOLD & HIRSCHMANN
24 Woodbine Avenue, Suite 8
Northport, New York 11768
(516) 261-0100

**Counsel of Record*

December 20, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

LIST OF PARTIES

Defendant/Appellee before the Seventh Circuit Court of Appeals and Petitioner herein: Cotter & Company. Cotter & Company is a Delaware corporation with its principal place of business in Chicago, Illinois. Pursuant to Supreme Court Rule 29.1, Cotter states that it has the following manufacturing divisions: Tru-Test Manufacturing Company, formerly known as General Paint & Chemical Company; General Power Equipment Company; and Lawn Chief Manufacturing Company Division. Cotter & Company is the member-owned cooperative wholesale distributor and manufacturer for True Value Hardware and V&S Variety Stores.

Plaintiff/Appellant before the Seventh Circuit Court of Appeals and Respondent herein: Robert E. Brizendine. Robert E. Brizendine is the Chapter 7 Trustee for the Bankruptcy Estate of Brown Transport Truckload, Inc., Brown Transport Corporation, and Thurston Motor Lines.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW..... 1

JURISDICTIONAL BASIS 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING WRIT..... 4

THE ISSUE HEREIN IS IDENTICAL TO THE ISSUE IN *SECURITY SERVICES v. K MART*..... 4

CONCLUSION 4

APPENDIX A .....App. 1

TABLE OF AUTHORITIES

Page

COURT DECISIONS

Freightcor Services, Inc. v. Vitro Packaging, Inc., No. 91-1507 (5th Cir. June 26, 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993) 3

Overland Express, Inc. v. Interstate Commerce Commission, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied*, (D.C. Cir. Sept. 22, 1993), *rev'g sub nom., Jasper Wyman & Son, et al.—Petition for Declartory Order—Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (1992) 3

Security Services, Inc. v. K Mart, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct. 18, 1993) (No. 93-284) 4

ADMINISTRATIVE DECISIONS

Jasper Wyman & Son, et al.—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc., No. 40510, 8 I.C.C.2d 246 (1992) 3

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

49 U.S.C. § 10761(a) 2

49 U.S.C. § 10762(e) 2-3

REGULATION

49 C.F.R. § 1312.4(d) 3

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

COTTER & COMPANY,

Petitioner,

v.

ROBERT E. BRIZENDINE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit and the denial of the petition for rehearing are reported at 4 F.3d 457. The decision of the United States District Court for the Northern District of Illinois granting summary judgment for Cotter & Co. is unreported but can be located at 1992 WL 182231 (N.D. Ill., July 24, 1992). A copy is annexed as **Appendix A.**

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Seventh Circuit was dated, filed and entered on

August 5, 1993. Cotter's petition for rehearing was denied on September 21, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

49 U.S.C. § 10761. Transportation prohibited without tariff

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements.

* * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

This case is an undercharge action filed by Robert E. Brizendine as the Trustee for the Bankruptcy Estate of Brown Transport Truckload, Inc. (hereinafter "Trustee"). Both the Trustee and Petitioner ("Cotter") filed motions for summary judgment with the District Court for the Northern District of Illinois. The District Court held that the tariffs upon which the Trustee based his undercharge claim referred to the Household Goods Carriers' Bureau Mileage Guide Tariff ("HGB") for distances. However, since Brown did not execute a power of attorney to participate in the HGB, the District Court held that Brown's tariff was void as a matter of law relying on *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (5th Cir. June 26, 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). The District Court entered judgment on July 24, 1992 and denied the Trustee's motion for reconsideration on August 3, 1992. The Trustee filed a notice of appeal on August 13, 1992. The United States Court of Appeals for the Seventh Circuit reversed the District Court based on the D.C. Circuit's opinion in *Overland Express, Inc. v. Interstate Commerce Commission*, which held that the I.C.C.'s regulation (49 C.F.R. § 1314.2(d)) amounted to a retroactive rejection of the carrier's filed tariff. *See Cotter*, 4 F.3d at 459, *citing, Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied*, (D.C. Cir. Sept. 22, 1993), *rev'g sub nom., Jasper Wyman & Son, et al.—Petition for Delcaratory Order—Certain Rates and Practices of Overland Express, Inc.*, No. 40510,

8 I.C.C.2d 246 (1992). The Seventh Circuit entered judgment on August 5, 1993, and subsequently denied rehearing on September 21, 1993.

REASONS FOR GRANTING THE WRIT

The Issue Herein Is Identical To The Issue In *K MART*

This Court's recent acceptance of *Security Services, Inc. v. K Mart* presents the same issue in the case at bar. *Security Services, Inc. v. K Mart*, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct. 18, 1993) (No. 93-284). Cotter requests that this Court grant *certiorari* in this case, but stay all briefing until the Court issues its opinion in *Security Services, Inc. v. K Mart* scheduled for oral argument in February 1994.

CONCLUSION

For the foregoing reasons, the Petition of Cotter should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PEZOLD & HIRSCHMANN
24 Woodbine Avenue, Suite 8
Northport, New York 11768
(516) 261-0100

JOHN F. MOYNIHAN
COTTER & COMPANY
2740 N. Clybourn
Chicago, Illinois 60614
(312) 975-2916

*Counsel of Record

December 20, 1993

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT E. BRIZENDINE, Trustee, etc., Plaintiff,	)	No. 91 C 6761
v.	)	
COTTER & COMPANY, etc., Defendant.	)	

MEMORANDUM OPINION AND ORDER

Robert Brizendine, Trustee in Bankruptcy on behalf of the estates of Brown Transport Truckload, Inc., Brown Transport Corp. and Thurston Motor Lines, Inc. (collectively "Brown"), has sued Cotter & Company d/b/a Tru-Test Manufacturing Company f/k/a General Paint & Chemical Co. Division, General Power Equipment Division ("Cotter") to recover for claimed undercharges based on what Brown asserts to be the controlling tariff that it had filed with the Interstate Commerce Commission ("ICC"). Just after the parties completed the extensive briefing on their cross-motions for summary judgment, Cotter's counsel has submitted for this Court's consideration a decision that was handed down by the Court of Appeals for the Fifth Circuit late last month, less than a week before Brown had tendered its final memorandum. In this Court's view that decision disposes of the entire dispute and hence this action itself.

Freightcor Services, Inc. v. Vitro Packaging, Inc., No. 91-1507, 1992 U.S. App. LEXIS 14578 (5th Cir. June 26, 1992) has upheld all aspects of the ICC decision on which Cotter had rested its defense of the invalidity and hence unenforceability of Brown's tariff (In re Jasper Wyman & Son (Certain Rates and Practices of Overland Express, Inc.), 8 I.C.C.2d 246 (1992)). It did so in large part based on its "defer[ence] to the agency's interpretation of its governing statute and regulations . . . if it has a reasonable basis in law" (1992 U.S. App. LEXIS 14578, at *10). And Freightcor Services, id. at *14-23 held that such deference, and the consequent decision that a noncomplying tariff was entirely void, does no violence to the limitation that has been imposed on ICC's power to reject tariffs retroactively, as spelled out in ICC v. American Trucking Ass'ns, Inc., 467 U.S. 354 (1984).

There is, to be sure, something to be said for Brown's contrary view as stated at length in its summary judgment memoranda. But on balance this Court finds the thoughtful opinion in Freightcor Services persuasive, and it therefore holds (consistently with that opinion) that:

> 1. Brown's failure to participate in the tariff of Household Goods Carriers' Bureau Mileage Guide in accordance with ICC regulations precludes Brown's reference to that tariff in its own filed tariff.
>
> 2. That failure voids Brown's tariff as a matter of law.
>
> 3. Brown therefore cannot rely on its invalid tariff to claim that the rates that it previously charged to Cotter represented undercharges.

In a sort of Pavlovian response to Brown's action, Cotter had not only answered the Complaint by challenging any attempted collection of claimed undercharges but had also filed a Counterclaim purporting to sound in both negligence and breach of contract. Its claimed damages (Counterclaim ¶ 3) are "in an amount equal to the difference between the agreed and negotiated rates and the rates alleged by plaintiff to be the applicable filed rates"—and by definition that claim is rendered moot by this Court's decision. Cotter also seeks to recover claimed damages for having had to retain counsel in this action and for having "incurred otherwise unnecessary expenses for clerical and managerial time spent dealing with the issues raised by the plaintiff in this complaint." That last-quoted language calls for a distortion of 49 U.S.C. §11705(b)—an invitation that this Court declines. And the claim for attorney's fee does not fit id. §11705(d)(3)—for Brown has not been "found liable under this subsection" (a reference to id. §11705(d)). Cotter's Counterclaim fails in its entirety.

There is no genuine issue of material fact, and Cotter is entitled to a judgment as a matter of law on Brown's Complaint. Cotter's Counterclaim is also without merit as a matter of law. This entire action is dismissed with prejudice.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: July 22, 1992